

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7163

To be argued by
SAMUEL K. ROSEN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

LEO M. SHORE,

Plaintiff-Appellant,

vs.

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH,
DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of
trusts for the benefit of his children, CHARLES B. YAFFE,
BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL
APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR
GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants.

PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH,
Defendants - Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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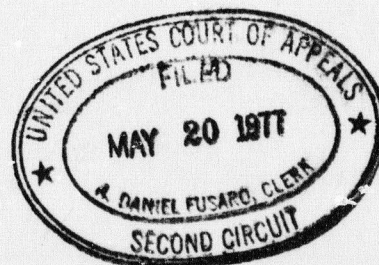


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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LEO M. SHORE,

Plaintiff-Appellant,

vs.

PARKLANE HOSIERY COMPANY, INC., HERBERT N.
SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH
as Trustee of trusts for the benefit of his
children, CHARLES B. YAFFE, BEULAH YAFFE,
DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL,
ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD,
STANLEY KUSCHNER and HAROLD STONE,

Docket No. 77-7163

Defendants,

PARKLANE HOSIERY COMPANY, INC. and HERBERT N.
SOMEKH,

Defendants-Appellees.

- - - - - X

APPELLANT'S BRIEF

ISSUE

The controlling question of law certified to this
Court under 28 U.S.C. §1292(b) is:

Whether the Court's findings of fact in
a prior action commenced by the Securities and
Exchange Commission ("SEC") can, by the doctrine
of collateral estoppel, be applied to a subse-
quent action by a different plaintiff, seeking
legal and equitable relief, based on the same
transaction as was the action commenced by the
SEC, when (a) there was no right to a jury trial
in that action and (b) the court found that the
subject transaction was effected by means of
materially misleading statements and omissions.

The Court below answered in the negative. Appellant
respectfully submits that this issue should have been answered
in the affirmative.

STATEMENT OF THE CASE

A. Preliminary Statement

This appeal is from an order dated January 14, 1977 wherein the Honorable Inzer B. Wyatt denied plaintiff's motion for summary judgment against defendants Parklane Hosiery Company, Inc. ("Parklane") and Herbert N. Somekh ("Somekh") based on the doctrine of collateral estoppel. For the reasons hereinafter shown, the motion should have been granted.

B. The Nature of the Case and the Proceedings Below

This class action was commenced in the Southern District of New York on November 13, 1974, against Parklane and twelve other defendants who were officers, directors and/or shareholders of Parklane as of the date of the merger described below. The action was certified, by Order dated May 2, 1975, as a class action on behalf of all Parklane shareholders, other than the defendants, on September 14, 1974. The complaint, as amended, (hereinafter the "Complaint") alleged violations of Sections 10(b), 13(a), 14(a) and 20(a) of the Securities Exchange Act of 1934, as amended (the "Act") and the rules and regulations promulgated thereunder.

The action is based upon a false and misleading proxy statement dated September 24, 1974 (the "Proxy Statement") which the Complaint alleges fraudulently caused a merger (the "Merger") in which the public shareholders of Parklane were bought out of Parklane.* As a result of the Merger, Parklane was merged into New PLHC Corp., a company which was incorporated solely to act as a corporation into which to merge Parklane. Prior to the Merger, the individual defendants in this action owned 71.6% of the issued and outstanding shares of Parklane. They transferred these shares to New PLHC Corp. immediately prior to the Merger and, at such time, their shares became its only asset. In full payment for their Parklane shares, the public shareholders were paid, in the Merger, \$2.00 per share cash, whereas the individual defendants received shares of New PLHC Corp. and the right to participate in its future business.

Plaintiff alleged in the Complaint that the Proxy

*The record date specified in the Proxy Statement for Parklane shareholders entitled to vote on the Merger was September 14, 1974, hence shareholders on that date, other than the defendants, comprise the class.

Statement was false and misleading in that, inter alia:

- (a) It made statements as to various reasons why Parklane would be converted to a privately-owned company, when, in fact, the true undisclosed reason for Parklane's conversion in corporate status was that Somekh was using such device in aid of meeting his personal financial obligations when there was no valid corporate purpose for such conversion in Parklane's status;
- (b) It made statements concerning the termination of negotiations with the Federal Reserve Board of New York ("FRB") with regard to Parklane's leasing of property located in New York City from the FRB, when, in fact, the defendants failed to disclose the existence of on-going negotiations with the FRB concerning the cancellation of such leasehold rights which

negotiations could have resulted in Parklane receiving substantial benefits;

- (c) It made statements that Parklane had employed two appraisers to determine the fair value of Parklane stock, when in fact, the defendants failed to disclose in the Proxy Statement that the two appraisers were not provided with sufficient information in order to prepare and provide a true and complete valuation of such stock.

Plaintiff further alleges that the distribution of the Proxy Statement was part of a fraudulent scheme giving rise to liability to the plaintiff and other members of the class under Rule 10b-5 of the Act and the common law.

In May, 1976, the Securities and Exchange Commission ("SEC") commenced an action in the Southern District of New York against Parklane and Somekh alleging that the Proxy Statement was false and misleading (the "SEC action"). After trial, Judge Duffy, in an Order and Opinion dated November 9, 1976, held:

- (a) "It is clear to me that the overriding purpose for the merger was to enable Somekh to repay his personal indebtedness. Had his finances been otherwise, the merger

may never have occurred. There is not so much as a hint of Somekh's huge debts in the Proxy Statement. The non-disclosure in the Proxy Statement is clearly established." (Opinion and Order at p.10). (Appendix at p. 86)

- (b) "I find that the October 4 conference between Somekh and the authorized representative of the FRB falls within the common usage of the term 'negotiation' footnote omitted. Thus, the unamended proxy material was false when it stated that 'there are no negotiations at present'." (Order and Opinion at p. 13). (Appendix at p. 89)

- (c) "The failure to inform Thomson & McKinnon one of the appraisers of these facts and the failure to disclose the defect in the appraisal in the Proxy Statement is beyond question." (Order and Opinion at pp.14 and 15). (Appendix at pp. 90-91)

Judge Duffy held that these misstatements in and omissions from the Proxy Statement were material in light of the standard set forth in TSC Industries, Inc. v. Northway, Inc., ____ U.S. ____, 96 S. Ct. 2126 (1976). (Order and Opinion at pp. 15 through 20). (Appendix at pp. 91 through 96)

In the SEC action Parklane and Somekh vigorously litigated the accuracy of the Proxy Statement, but the Court found that the Proxy Statement contained material misstatements and omitted to state facts necessary to make the contents thereof not misleading. A review of the Court's decision in that case also makes clear that such misstatements and omissions were made with an intent to deceive, manipulate and defraud, clearly meeting the standard set forth, to establish Rule 10b-5 liability, in Ernst & Ernst v. Hochfelder, ____ U.S. ____, 96 S. Ct. 1375 (1976)* Thus the decision in the SEC action dealt with and found, after trial, that the basic allegations in plaintiff's amended class action complaint are true and the standard for determining liability under plaintiff's claim under Rule 10b-5 have been met. A fortiori, plaintiff's claims under Rule 14a-9 have been met. Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1298-1301 (2d Cir. 1973).

Plaintiff moved for summary judgment based on the doctrine of collateral estoppel because, by virtue of the Opinion and Order in the SEC action, no genuine issues of material fact remained between the plaintiff class and defendants Parklane and Somekh. The Honorable Inzer B. Wyatt denied this

*". . .I do believe his [Somekh's] violation of Section 14(a) and that of his company were knowing thus meeting the statutory requirements. . ." (Opinion and Order at p. 23). (Appendix p. 99).

motion on January 14, 1977, upon the ground that collateral estoppel effect, based on the findings in the SEC action, could not be granted because the defendants had no right to a jury trial in the SEC action. His decision, in full, was as follows:

The within motion is denied. Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970). So Ordered.

On January 24, 1977, plaintiff moved the district court pursuant to 28 U.S.C. §1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure ("FRAP") for an order amending the interlocutory order which denied plaintiff's motion for summary judgment.

By Order dated March 4, 1977, filed and entered March 7, 1977, Judge Wyatt, pursuant to the authority vested in him by §1292(b), certified that the matter involved was a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

On March 17, 1977, plaintiff filed a petition for permission to appeal pursuant to §1292(b) and FRAP 5(a) with this Court. By Order dated April 5, 1977, the Honorable J. Edward Lumbard, Walter R. Mansfield, and Murray I. Gurfein, granted petitioner leave to appeal.

ARGUMENT

POINT I

COLLATERAL ESTOPPEL MANDATES GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AGAINST PARKLANE AND SOMEKH AS THERE ARE
NO MATERIAL FACTS IN ISSUE.

The doctrine of collateral estoppel operates to preclude re-litigation in a subsequent suit of facts which were actually litigated and determined in a prior action. The Courts have frequently reiterated the notion that judicial and societal interests are best served by the proper employment of the doctrine of collateral estoppel.

Collateral estoppel in federal court essentially provides that, where a fact to be litigated was actually litigated in a prior suit and final judgment was entered thereon, the party against whom the doctrine is sought to be invoked will not be permitted to retry the issue when he has had a full opportunity to do so in the earlier suit. See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971); Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973); Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973); Ritchie v. Landau, 475 F.2d 151 (2d Cir. 1973); 1 B Moore's Federal Practice ¶ 0.441 /2/ (2d Ed. 1974).

The Supreme Court in Blonder-Tongue, supra, invoked the doctrine of collateral estoppel in a patent infringement action where the plaintiff sought to prove the validity of a

patent, which had earlier been proven invalid, against a defendant who was not a party to the first suit. Justice White, writing for a unanimous court, approved the use of collateral estoppel even though the parties to the second suit had not been parties to the prior action. He established that the inquiry is, rather, " . . . whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." 402 U.S. at 328.

Numerous decisions involving various other issues, have upheld the right of a plaintiff who was not a party to the first action to offensively use a judgment obtained by a different plaintiff against the same defendant as long as this opportunity requirement was satisfied. Humphreys v. Tann, supra, (airplane crash); Garcy Corp. v. Home Insurance Company, 496 F.2d 479 (7th Cir. 1974) (insurance); Skrzat v. Ford Motor Company, 389 F. Supp. 753 (R.I. 1975) (personal injury); Michini v. Rizzo, 379 F. Supp. 837 (E.D. Pa. 1974) (civil rights); 1 B Moore's Federal Practice, ¶ 0.441 [27] (2d Ed. 1974) and cases cited therein.

For example, the Court in Humphreys v. Tann, supra, an action for damages resulting from an airplane collision, blessed the offensive use of collateral estoppel.

While the doctrine of collateral estoppel permits a prior judgment to preclude litigation of an issue previously determined on its merits, it may be applied in favor of a stranger to the first action, but only against a party to that action. 487 F.2d at 671. (Emphasis in original).

Once, therefore, an issue has been litigated, a litigant may estop a subsequent party from relitigating the same issue. It is simply necessary for the party against whom the plea of estoppel is asserted to have been either a party to, or in privity with, a party in the prior case. Blonder-Tongue, 402 U.S. at 323-324.

The issues in the SEC action are identical to the claims which are the crux of this action. Parklane and Somekh were parties to the earlier case. It is unquestionable that the first action was defended with full vigor and Parklane and Somekh given full opportunity to be heard. They should, therefore, be estopped to relitigate these same claims.

Plaintiff has also alleged pendent claims under New York State law in Count IV of the amended complaint. Since the facts found by Judge Duffy also prove plaintiff's contention that Parklane and Somekh breached their common law duties to plaintiff and the other members of the class, plaintiff is also entitled to summary judgment on Count IV of the Amended Complaint.

The New York standard for granting the benefits of collateral estoppel to a stranger to a prior action is as follows:

In determining whether one not a party to a prior proceeding can successfully raise the defense of collateral estoppel as to an issue which had been litigated in that prior proceeding, New York State has adopted the 'full and fair opportunity' test. Under this test the defense is available if the party against whom it is raised has had a full and fair opportunity to contest the issue in a prior action and the issue which was decided in the prior action is identical to the issue which is to be decided in the action in which the defense is raised. Schwartz v. Public Adm. of County of Bronx, 24 N.Y.2d 65, 298 N.Y.S.2d 955, 246 N.E.2d 725 (1969); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451 (5th Cir. 1971), cert. denied, 404 U.S. 940, 92 S.Ct. 280, 30 L.Ed. 2d 253 (1972). Ritchie v. Landau, *supra*, at 155.

Thus, under New York State, as well as federal, law the collateral estopped doctrine estops Parklane and Somekh to relitigate the facts contained in Judge Duffy's decision.

The issue at hand is whether the Proxy Statement was false and misleading in failing to state that the true purpose of the Merger was to bail out Somekh from certain personal obligations, in failing to describe the status of Parklane's negotiations with the FRB and in failing to disclose the status of those negotiations to Parklane's appraisers.

That the Proxy Statement was misleading on these

grounds was specifically found in the SEC's action. Parklane and Somekh have already litigated these questions once and they should not be permitted to do so again. The findings in the SEC's action prove plaintiff's case against Parklane and Somekh and entitle plaintiff to summary judgment against them.

Parklane and Somekh further contend that the collateral estoppel doctrine cannot be applied here because the trial in the SEC action was to a judge rather than a jury. They claim that, under the Seventh Amendment, since in the prior action they were not entitled to a jury trial, they are here so entitled. We turn now to that question.

POINT II

DEFENDANTS ARE NOT ENTITLED TO A JURY TRIAL IN THIS ACTION

Judge Wyatt, by virtue of denying plaintiff's motion for summary judgment, indicated that collateral estoppel effect could not be given in this case to the findings of Judge Duffy because in the SEC action the defendants Parklane and Somekh had no right to a jury trial. According to Judge Wyatt, the Seventh Amendment mandates a jury trial in this case, even though the identical issues were already tried to the Court in the SEC action. In denying the motion, Judge Wyatt relied on Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), cert. denied, 403 U.S. 904 (1971). Plaintiff respectfully submits that such decision was in error, is not the law as interpreted by either the Supreme Court or this Circuit and is not dispositive of the issues raised in this action since plaintiff is here seeking equitable relief (which was not sought in Rachal) in addition to legal relief.

In Rachal, the plaintiff, in a private action seeking only money damages, sought by the application of the collateral estoppel doctrine, to estop the defendants to deny facts found against them in a prior SEC injunction action and, on that basis, to award plaintiff summary judgment. The Court of Appeals for the Fifth Circuit did not permit the application of the doctrine holding that to apply it, in that case, would deny the defendants their right to a jury trial.

In Rachal, the Court believed that it was faced with two conflicting doctrines - a party's Seventh Amendment jury rights (as interpreted, incorrectly as plaintiff will demonstrate, by the Fifth Circuit) and the growing ambit of the application of the collateral estoppel doctrine. Faced with a perceived conflict, the Court of Appeals for the Fifth Circuit recognized that the requirements of the Seventh Amendment are paramount and that a jury trial was required in the second action. An analysis of the comments on the Rachal decision, the case law prior to and subsequent to that decision and the historical background of the Seventh Amendment all make it abundantly clear that the Fifth Circuit misconstrued the Seventh Amendment requirements. As a result of that misapprehension, the Rachal Court created a right to jury trial where none existed before and none has arisen since. Shapiro and Coquillette, "The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill," 85 Harv. L. Rev. 442 (1971) (hereinafter Shapiro and Coquillette). Accord, Goldman, Sachs & Co. v. Edelstein, 494 F.2d 76 (2d Cir. 1974); Crane Co., v. American Standard Inc., 490 F.2d 332 (2d Cir. 1973); In re Transocean Tender Offer Securities Litigation, 427 F. Supp. 1211 (N.D. Ill. 1977); Whitman Elec. Inc. v. Local 363 Int. Bro. of Elec. W., 398 F. Supp. 1218 (S.D.N.Y. 1974); Note, "Goldman, Sachs & Co. v. Edelstein: The Application of Collateral Estoppel Principles in Derogation of the Right to Jury Trial," 1974 Duke L.J. 970 (1974).

The Rachal Court, in reaching its decision, relied heavily upon Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). It is respectfully submitted that Rachal completely misinterprets Beacon Theatres.* The Supreme Court in Beacon Theatres reversed a denial of a writ of mandamus and ordered that a legal counterclaim be tried prior to the equitable claim. In so doing, the Supreme Court assumed that, if the equitable claim were to proceed first, the application of the doctrine of collateral estoppel could preclude a jury determination of issues raised by the legal counterclaim. Beacon Theatres, Inc. v. Westover, 359 U.S. at 504. In so doing, the Supreme Court never meant to imply that a possible jury trial right limits the application of the doctrine of collateral estoppel. Instead, the Court stated that when the doctrine of collateral estoppel is applicable, there is no right to jury trial. As Shapiro and Coquillette state:

Beacon Theatres thus indicated that whenever principles of former adjudication or law of the case might preclude jury trial on an issue previously litigated before a judge in the same proceeding, the trial judge must, in the absence of exceptional circumstances, order the trial of issues within that proceeding to assure that foreclosure does not occur. But Beacon Theatres did not imply that principles of former adjudication should themselves be changed under the influence of the seventh

* The Second Circuit in Crane, supra, while questioning the soundness of the decision in Rachal, credited Shapiro and Coquillette as properly analyzing Beacon Theatres and the subsequent Supreme Court decision in Dairy Queen v. Wood, 369 U.S. 469 (1962). Crane, supra at 343.

amendment. Rachal takes exactly the opposite tack from Beacon Theatres, concluding that seventh amendment considerations do influence the application of these principles when reordering is impossible, as it was in Rachal because of the separateness of the two proceedings.

* * *

No procedural reforms - merger of law and equity, declaratory judgment, or anything else - can be said to have affected the equitable character of the relief sought by the SEC in the initial proceeding or to have given the defendants a right to a jury in that action. Instead, Rachal raises the wholly different question whether the seventh amendment requires relitigation of an issue already decided adversely to the party who now asserts a jury trial right. Is there really an anomaly, as the Fifth Circuit seemed to think, in concluding that a jury must be given on an issue not yet adjudicated, but that an issue need not be relitigated once it has been decided by the court sitting alone?
Id. at 446-447. (Emphasis in original).

Moreover, the authors claim that Rachal's reliance on other Supreme Court decisions, i.e., Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), and Scott v. Neely, 140 U.S. 106 (1891)*, is equally misplaced. Shapiro and Coquillette, 85 Harv. L. Rev. at 447-448.

In short, Beacon Theatres states that if neither an equitable nor a legal claim has yet been heard, the legal claim

* Scott v. Neely, supra, although not directly relied upon by the Rachal Court, was cited within the quotations from Beacon Theatres which were relied upon by Rachal.

must be heard first in order to avoid precluding a jury trial on that legal claim. The Court specifically stated:

If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. Id. at 510 (Footnote omitted) (Emphasis Added).

The Supreme Court recognized that, if the equitable claim were heard first, because of the doctrine of collateral estoppel, there would be no right to a jury on the legal claims. In Beacon Theatres, where the Court could determine the order of trial of the claims because neither one had yet been heard, it ordered that the legal claims be heard first. Here, where the non-jury trial has already been concluded and findings of fact rendered, reordering the trials of the claims is impossible. Thus, Beacon Theatres compels the conclusion that the Seventh Amendment does not mandate granting defendants Somekh and Parklane the right to have a jury re-hear and re-determine issues already determined by the Court in the SEC action.*

* Clearly, these defendants cannot contend that even without the decision in the SEC action, if their case were argued to a jury, the jury must decide the case. (Footnote continued on page 19).

To argue that the Seventh Amendment negates the application of the doctrine of collateral estoppel to the instant case, stands Beacon Theatres on its head and injects an alleged Seventh Amendment right into an area where the Supreme Court has never recognized one to exist.

This argument was specifically adopted by the Second Circuit in Crane Co. v. American Standard, Inc., supra. Crane was a lengthy and complex action in which, over an extended period of time, numerous determinations on legal and equitable issues were made. The Court there, by the doctrine of collateral estoppel, applied facts, adduced in a prior non-jury proceeding, to a subsequent proceeding involving the same two parties, in which a possible jury trial existed,

(continued)

* It is well established that a court has full constitutional power to withdraw a case from a jury under FRCP 50(a) or (b) and that such action does not violate a party's seventh amendment rights. See, e.g., Wright & Miller, Federal Practice & Procedure : Civil Sec. 2522. In the SEC action, Judge Duffy made certain specific findings that the Proxy Statement was materially false and misleading in the same manner as that alleged by plaintiff. Furthermore, those findings make clear that the standard for imposing liability under Rules 10b-5 and 14a-9 have been met. See page 7 above. Plaintiff respectfully submits that to grant collateral estoppel effect to Judge Duffy's findings would be analagous to the procedure of granting a directed verdict or judgment notwithstanding the verdict as authorized by the Federal Rules of Civil Procedure.

stating:

The very basis of Beacon Theatres was that the effect of a trial of the equitable claim "could be, as the Court of Appeals believed, 'to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damages suit,' for determination of the issue of clearances by the judge might 'operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim.'" 359 U.S. at 504, S.Ct. at 953. It was to avoid this preclusive effect that the Supreme Court directed initial trial of the legal counterclaim. Here the merits of the fraud action had been tried by a judge in equity, without objection or basis for one, and reviewed in appeal. This court's determination in its opinion on appeal stands beyond challenge in the fraud action and precludes relitigation by the parties of all issues resolved there. Id. at 342-343. (Emphasis added).

The Crane court then relied on the extensive historical analysis by Shapiro and Coquillette of the Seventh Amendment right to trial by jury.* In applying by collateral estoppel facts determined in a prior equitable determination, that court

* Such an historical analysis of the Seventh Amendment jury trial right has been recently reblessed by the Supreme Court in Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission, ____ U.S. ____, 97 S.Ct. 1261 (1977). The Supreme Court there held that Congress could assign adjudication of facts to an administrative agency without a jury trial. The Court stated that the Seventh Amendment was not intended to establish the jury as the exclusive mechanism for fact-finding. As such, assessing penalties for violating the Occupational Safety and Health Act did not violate a party's Seventh Amendment jury trial right. Id. at ____, 97 S.Ct. 1271-1272.

stated:

The framers of the Seventh Amendment sought to preserve the right to a jury trial in civil cases as it had existed "at common law." The authors cite abundant eighteenth century precedent, on both sides of the Atlantic, that a decree in equity was recognized as having preclusive effect in a subsequent action at law between the same parties. With the merger of law and equity effected by the Federal Rules of Civil Procedure, a judgment in a suit which had been properly brought and tried as a suit in equity must govern all future proceedings between parties to which collateral estoppel would normally apply. 490 F.2d at 343 (Emphasis Added).*

Subsequent to Crane, the Second Circuit, in Goldman, Sachs & Co. v. Edelstein, supra, issued a writ of mandamus to revise the order of the commencement of trials in a number of related actions, before any trial began, so that an action to be tried to a jury, would precede a trial in which a jury had been waived. In that case, numerous damage actions were brought against Goldman, Sachs for alleged violations of the federal securities laws. After consolidation of the cases for pretrial discovery purposes, one of the cases, in which a jury trial had been waived, was ordered to trial first, even though the parties expected that case to be tried last. Wary of possible collateral estoppel effects in the jury trials of the related cases,

*There is no dispute that Blonder-Tongue, supra, and the subsequent cases, establish plaintiff as a party to whom collateral estoppel would apply and a party who may affirmatively apply to this action the facts adduced in the SEC action even though he was not a party to that action.

Goldman, Sachs sought mandamus from the Court of Appeals to require the District Court to proceed with a jury trial first. In issuing the writ, the majority stated:

. . . .some doubt arises, by reason of views expressed by us recently in Crane Co. v. American Standard, Inc. [citation omitted] as to whether a prior non-jury trial of the same issues in one case will estop a jury resolution of them in another. Id. at 78.

In Note: Goldman, Sachs & Co. v. Edelstein, in 1974 Duke L.J., supra at 973, it is suggested that "by invoking the dictum in Crane which had been critical of Rachal, the Goldman Court apparently elected to renew its attack on the Fifth Circuit case in an attempt to expand the scope of collateral estoppel in the Second Circuit." The Note further argues (at 986) that mandamus was not necessary in Goldman, Sachs in order to safeguard the jury trial rights. Rather than following the Crane analysis, the Second Circuit could have distinguished Rachal on its facts. In one of the Goldman, Sachs cases, the parties had waived a jury trial. The waiver was probably made in reliance on the original anticipated order of trials which required a jury trial be litigated first. When the non-jury case was ordered tried first, the Court could have refused collateral estoppel effect to any judgment obtained therein based on the fact that the waiver was obtained in

reliance on the original order of trials. The Second Circuit did not in fact even attempt to distinguish Rachal, rather it issued the writ on the basis of Crane's attack on Rachal.

Moreover, after losing the first jury trial, Goldman, Sachs sought to delay the non-jury trial until after every jury case brought against it had been decided. The Second Circuit again issued a writ of mandamus ordering the jury trials to be completed first. "By issuing an order of such broad scope, the Second Circuit further indicated its apparent determination to reject the Rachal rule against applying collateral estoppel principles in derogation of the right to jury trial." Id. at 987 n. 87. Thus the Second Circuit in Goldman, Sachs rejected Rachal, by recognizing that any determination of identical issues in a prior non-jury trial has collateral estoppel effect in subsequent trials and removes from them the jury right. As in Beacon Theatres, since the Court had the opportunity to order the trials, it did so to avoid foreclosing a jury right. However, in the instant case, where the order of trials could not be determined by the Court, the effect of the prior non-jury trial, as recognized in Beacon Theatres, Crane and Goldman, Sachs, is to preclude a jury trial on the facts found in the SEC action and to apply them here by virtue of the collateral estoppel doctrine.

Subsequent to Crane and Goldman, Sachs, Judge Motley of the Southern District of New York, specifically held that an NLRB proceeding (which she found akin to a suit in equity) precluded a subsequent jury trial of the issues determined in that NLRB proceeding, where the subsequent legal action was commenced by a different plaintiff. In Whitman Elec., Inc., supra, Judge Motley, citing Crane, supra, and the Shapiro and Coquillette article stated:

Bearing in mind that NLRB cease and desist proceedings are akin to suits in equity, the court notes that collateral estoppel effect can be given judgments in equitable actions without unconstitutionally depriving the parties of their right to a jury trial in subsequent legal actions. See, e.g., Crane Co. v. American Standard, Inc. /citation omitted/ (alternate holding) /Footnote omitted/, 398 F. Supp. at 1223 (Emphasis added).

More recently, an equitable determination in a prior trial was held to preclude a redetermination of the same issues in an action at law, even though the parties would have been entitled to a jury trial had the prior equitable determination not been made. In re Transocean Tender Offer Securities Litigation, supra. The prior action therein had been brought in the Chancery Court in Delaware and tried without a jury. The plaintiffs therein, like Parklane and Somekh herein, citing Rachal, argued that to accord collateral

estoppel effect to that judgment would deny them their Seventh Amendment right to trial by jury. In giving collateral estoppel effect to the Chancery Court's judgment, the Court found that the Seventh Amendment did not mandate a jury trial. The Court held that a prior judgment in equity permitted the application of the collateral estoppel doctrine, and hence could preclude a jury trial in a subsequent legal action. Id. at 1217.

Even if the Rachal Court were right in its analysis of the Seventh Amendment right to jury trial and its effect on plaintiff's present motion for summary judgment, Shapiro and Coquilletette ask whether a jury trial in this case would be appropriate. Their compelling response is that it would not. They state:

Are there factors favoring a jury trial even though history, viewed directly or through the prism of procedural change, does not require it? The costs are clear enough. The time of the court must be taken up with relitigation of an issue already fully tried in a proceeding in a coordinate court whose procedures are comparable in every respect but the availability of a jury. Hill, a private plaintiff whose resources are presumably limited, is unable to derive any benefit from the earlier litigation conducted by the government, even though the government itself was acting to protect the interests of private investors like him.

* * *

* * *

We confess ourselves unable to find the benefits to be weighed in the balance against the problems that are raised. Shapiro and Coquillette at 457. (Footnotes omitted). (Emphasis added).

Furthermore, the facts in the instant case provide an additional basis for holding that the defendants are not entitled to a jury trial. Unlike the plaintiff in Rachal, plaintiff here seeks both equitable relief (rescission) and legal relief. Judge Wyatt did not distinguish between these two forms of relief. The defendants against whom summary judgment is sought would clearly not have had a right to a jury trial in this action if the plaintiff sought only rescission. Accordingly, since the authorities cited above make it abundantly clear that plaintiff is entitled to summary judgment on his legal claims, the granting of summary judgment on the equitable relief sought by plaintiff is mandated, a fortiori.

It is apparent that the purpose of the collateral estoppel doctrine is to foster judicial efficiency. Once a person has had a fair opportunity to litigate a question, he should not be permitted to draw the same issue into controversy an additional time. Defendants Parklane and Somekh had a full and fair opportunity to vigorously litigate their

liability, they did so, and they lost. The fact that they did not try their facts to a jury in the prior case does not permit them to retry the same issues again.

A jury trial

. . . serves important values that may justify its retention even in the absence of constitutional constraints. But whatever its worth when an issue has not yet been litigated, its use to retry a complex question already fully and fairly aired in an adversary proceeding seems to us to involve a net loss of substantial proportions. Nothing in the seventh amendment, in the Supreme Court's interpretation of it, or in considerations of fairness and justice requires such a loss to be borne. Shapiro and Coquillette, supra at 458 (Emphasis Added).

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that the decision of the District Court be reversed and that plaintiff's motion for summary judgment be granted.

Dated: New York, New York
May 20, 1977.

Respectfully submitted,
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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

JOHN BYRNES, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 21-59 42ND ST.
ASTORIA.

That on the 20 day of MAY, 1977,
deponent personally served the within BRIEF FOR APPELLANT

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses

JACOBS, PERSINGER + PARKER
ATTORNEYS FOR DEFENDANTS-APPELLEES
70 PINE ST.
NEW YORK, N.Y. 10005

Sworn to before me this
20 day of May, 1977
Michael DeSantis

John Byrnes

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979